

Nguyen (Migration) [2018] AATA 2625 (15 June 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mrs Tuna Nguyen
VISA APPLICANT:	Mr Hoang Giang Pham
CASE NUMBER:	1621855
DIBP REFERENCE(S):	2016/038248 2016038248
MEMBER:	Russell Matheson
DATE:	15 June 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211, cl.309.212 and cl.309.213 of Schedule 2 to the Regulations; and • cl.309.221 of Schedule 2 to the Regulations.

Statement made on 15 June 2018 at 8:24am

CATCHWORDS

Migration – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional) visa – Financial aspects – Shared wedding expenses – No major assets – Live in different countries – Sponsor visits Vietnam – Shared living arrangements in Vietnam – Credibility – Broadly consistent and detailed oral evidence – Witness statements – Significant amount of additional documentary evidence – Stable relationship – Keep in touch regularly via social media – Decision under review remitted for reconsideration

LEGISLATION

Migration Act 1994 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A Schedule 2 cls 309.211, 309.212, 309.213, 309.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 9 December 2016 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant is a 25 year old male national of Vietnam. He applied for the visa on 14 April 2016 on the basis of his relationship with his sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.309.211(2).
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211(2) because the delegate was not satisfied the visa applicant is the spouse of the sponsor.
4. The sponsor appeared before the Tribunal on 20 March 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant and five witnesses.
5. The sponsor was represented in relation to the review by her registered migration agent.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the visa applicant is the spouse of the sponsor as defined in s.5F of the Act
8. The Tribunal has before it the Departments file relating to the visa applicant; its own file; and a copy of the Department's decision provided by the sponsor (review applicant) to the Tribunal.
9. The evidence the parties and witnesses provided at the Tribunal hearing is recorded throughout this decision record.

Whether the parties are in a spouse or de facto relationship

10. Clauses 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
11. 'Spouse' is defined in s.5F of the Act; it provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together,

or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

12. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The visa applicant provided a copy of the marriage certificate registered in Vietnam on 24 December 2015. There is no evidence before the Tribunal to indicate that the marriage is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

13. In forming an opinion as to whether they are in a marital relationship and in considering whether they have a mutual commitment to a shared life as husband and wife to the exclusion of all others, whether their relationship is genuine and continuing, and whether they live together and not separately and apart on a permanent basis as defined in s.5F(2)(b)-(d), the Tribunal has regard to all the circumstances of the relationship. This includes evidence of the financial and social aspects of the relationship and the nature of the visa applicant's and sponsors household, as well as their commitment to each other, as set out in r.1.15A(3).
14. After careful consideration of all of the evidence before it, the Tribunal has reached the conclusion that it is satisfied the visa applicant is the spouse of the sponsor within the meaning of s.5F of the Act. Below the Tribunal sets out its consideration of the evidence under the relevant aspects of matters it must take into consideration under r.1.15A(3), and the reasons for its decision.
15. The Tribunal had the benefit of the visa applicants and the sponsor's oral evidence, five witnesses and a significant amount of additional documentary evidence at the hearing. The Tribunal gave all the evidence provided by the parties' at the Tribunal hearing and evidence provided by the visa applicant to the Department in the primary application and Tribunal file due regard. The Tribunal considered evidence given by the sponsor, the visa applicant and witnesses to be detailed, consistent and plausible.

16. Financial aspects

17. The Tribunal has considered the financial aspects of the relationship including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, whether any person in the relationship owes any legal obligation in respect of the other, and the basis of any sharing of daily household expenses and any combined future financial commitments or plans.
18. The Tribunal accepts there is a degree of difficulty of establishing and sharing financial resources due to geographical separation when the sponsor and the visa applicant live in separate countries.
19. The parties stated that when they are together in Vietnam they share the bills and day to day living expenses. The sponsor said that she has \$15,000 in savings; the visa applicant said that he has \$7,000 in savings. The parties said that they would utilise their savings to move into their own unit together. The sponsor said that she is living in a shared arrangement with

two other people in a three bedroom unit in Westmead and currently pays \$200 a week rent. The parties had sound knowledge of each other's income and finances.

20. The parties stated that they shared the cost of their wedding and provided receipts for all of the reception and all other incidentals such as printing, the wedding dress and hotel. The Tribunal places moderate weight on the receipts as they are all handwritten and the Tribunal is unable to determine who actually paid for the items. The sponsor said that she sold her property in Prestons to pay for the debts that she had incurred paying for the visa application and the couples wedding in Vietnam.
21. The parties at times during the hearing gave detailed and consistent evidence in relation to the financial aspects of the relationship and at other times the visa applicant was vague when questioned as to the actual costs incurred for the parties wedding expenses.
22. The parties' evidence is that they have no joint liabilities and no major assets such as property together. Based on the evidence before it, the Tribunal finds there is little evidence of pooling or sharing financial resources or sharing the day to day household expenses or any ongoing financial obligations. There is no evidence before the Tribunal that one person in the relationship owes any legal obligation in respect of the other. The Tribunal places moderate weight on this aspect of the relationship.

23. ***Nature of the household***

24. The Tribunal has considered the nature of the household including any joint responsibility for the care and support of children if any, living arrangements of the parties and the sharing of the responsibility for housework.
25. The Tribunal has considered the nature of the household. The Tribunal accepts there is a degree of difficulty in establishing a joint household when the parties live in separate countries.
26. The parties provided proof of temporary registration at the visa applicant's household in Vietnam for the period 12 December 2015 to 1 January 2016. The sponsor visited the visa applicant in Hanoi from 14 September to 30 September 2017. The sponsor provided as evidence contemporaneous notes and photographic evidence of her visit to Vietnam. The sponsor stated that when she visited the visa applicant in Vietnam she helped with the cooking and cleaning. The visa applicant stated that when the sponsor visits him in Vietnam his mother generally does the housework to allow the couple to go out visiting family and sightseeing.
27. The parties provided documentary evidence of temporary household registration for the sponsor at the visa applicant's address for the period 12 December 2015 to 1 January 2016. The sponsor claimed to have applied for temporary household registration at the visa applicant's house for her last trip to Vietnam from 14 September 2017 to 30 September 2017 but did not produce any documents to prove that this had actually occurred. The Tribunal accepts that the sponsor has stayed at the home of the visa applicant in Vietnam.
28. The Tribunal questioned the parties in relation to their living arrangements in Australia and Vietnam. The parties, when describing their living arrangements together in Vietnam were well versed and used the same terminology but presented limited evidence of establishing a joint household together.

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30. The parties provided broadly consistent and detailed oral evidence of their activities and living arrangements when together in Vietnam. Based on the evidence presented by the parties, the Tribunal accepts that they live together and have established a joint household together when the sponsor visits the visa applicant in Vietnam. The Tribunal places some weight on this aspect of the relationship.

31. Social aspects

32. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.
33. There are several statements from third parties that were provided as additional information and evidence to the Tribunal. The Tribunal also received oral evidence from five witnesses attesting to the nature of the parties' relationship.
34. The sponsor provided contemporaneous notes detailing the parties' social activities when the sponsor visited the visa applicant in Vietnam for the period 14 September 2017 to 30 September 2017. The parties also provided as evidence receipts for their wedding reception and all other incidentals such as printing, the wedding dress and hotel stays. The parties stated that they dined out, went sightseeing, shopping and visited friends and family when the sponsor visited the visa applicant on her recent trip. The Tribunal accepts that the parties have socialised together on limited occasions when the sponsor visits the visa applicant in Vietnam. The parties provided statutory declarations from family members and friends attesting to their relationship, and a selection of wedding photos and additional photos of the sponsor's recent trip to Vietnam in the presence of family and friends. The Tribunal places some weight on the evidence supporting the social aspect and the development of the relationship.
35. Overall, the Tribunal accepts the visa applicant and the sponsor plan and undertake social activities and travel together. The Tribunal finds that the parties represent themselves to family, friends and other people as being in a marital relationship. The Tribunal is satisfied that family, friends and relatives view the relationship as a genuine and committed one.

36. Commitment

37. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length and time the parties have lived together, the degree of companionship and emotional support they provide each other, and whether the parties view the relationship as a long-term one.
38. The parties claim to have known each other since August 2011 and dated for a short period of time when the sponsor visited family in Vietnam with her mother. The parties stated that their relationship developed and their feelings grew stronger over the coming years and they kept in touch regularly via social media during times of separation. Although there is an absence of supportive documentary evidence of the parties' communication with each other the Tribunal found the parties oral evidence convincing.
39. The parties stated that their families accepted their relationship. The visa applicant proposed to the sponsor on 3 August 2015 via telephone and the parties were married on 24 December 2015. To date, the parties have been in a relationship exceeding six years. The Tribunal accepts that the parties are lawfully married.

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41. The parties stated that they would live together at Westmead in New South Wales and were planning to have a family. The visa applicant said that he would study and learn English and obtain a drivers licence and seek gainful employment upon arrival in Australia. The visa applicant stated that a family member had arranged employment for him in Australia with a transport company if he was granted a visa. The parties said that they would both work and use their savings to purchase their own property together and they were committed to making a contribution to the economic and social growth of Australia.
42. The parties stated that they would hold another wedding reception in Australia for all the family and friends in Australia who could not attend their wedding in Vietnam. The parties further stated that they would return to Vietnam regularly to visit their family and friends.
43. The parties presented significant documentary and photographic evidence of their relationship and had a sound knowledge of each other's family, living arrangements, health, employment and personal history.
44. The Tribunal notes that the visa applicant and the sponsor were able to articulate the reasons for their decision to form a relationship and spoke of their common interests and expectations.
45. The Tribunal accepts that the parties see their relationship as stable, mutually supportive and a long term one. The Tribunal considers their evidence with regard to their commitment to each other plausible, persuasive and credible.
46. The Tribunal finds the visa applicant and the sponsor provide each other with a degree of companionship and emotional support that is commensurate with a couple being in a genuine and continuing relationship.
47. Having regard to the entirety of the circumstances, the Tribunal is satisfied the visa applicant and the sponsor have a mutual commitment to a shared life as husband and wife to the exclusion of all others. The Tribunal is satisfied their relationship is genuine and continuing and they do not live separately and apart on a permanent basis.

48. Findings

49. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision.
50. Given these findings the Tribunal is satisfied that at the time the visa application was made and at the time of this decision the parties were in a spousal relationship. Therefore the visa applicant meets cl.309.211(2) and cl.309.221.
51. There is no evidence before the Tribunal that the spouse of the visa applicant is prohibited from being the sponsor of the visa applicant. The Tribunal is satisfied that the sponsor, at the time of visa application and decision, was an Australian citizen who had turned 18. Therefore the visa applicant meets cl.309.212 and cl.309.213.
52. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

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DECISION

56. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- cl.309.211, cl.309.212 and cl.309.213 of Schedule 2 to the Regulations; and
 - cl.309.221 of Schedule 2 to the Regulations.

Russell Matheson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).